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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-950

STATE OF CALIFORNIA,

Petitioner,

vs.

MARK LEE HARRIS,

Respondent.

2113

On Writ of Certiorari to the California Supreme Court

14

PETITION FOR WRIT OF CERTIORARI

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MARK LEE HARRIS,

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PETITION FOR WRIT OF CERTIORARI

The petitioner State of California respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered on October 7, 1975, in this appeal from the respondent's conviction.

Opinions Below

The opinion of the California Supreme Court, reversing the judgment of conviction, is reported at 15 Cal. 3d 384, 124 Cal. Rptr. 536, 540 P. 2d 632 (1975). A copy of the California Supreme Court's opinion appears as Appendix A to this petition. The opinion of the California Court of Appeal for the Second Appellate District, Division Five, reported and then vacated, which reversed the judgment of conviction, appears as Appendix B to this petition.

Jurisdiction

The judgment of the Calfornia Supreme Court was filed on October 7, 1975. This petition for a writ of certiorari is filed within 90 days of that date and is therefore timely filed. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3). *See, e.g., Gilbert v. California,* 388 U.S. 263, 265 (1967); *Parker v. Gladden,* 385 U.S. 363, 364 (1966).

Question Presented

Whether a police officer who has reasonable cause to believe that a suspect has committed a crime, does not have adequate probable cause to arrest, but knows that an eyewitness is only a short distance away at the scene of the crime, may transport that suspect to the scene of the crime for possible identification as part of a valid investigatory detention as is allowed by the Fourth Amendment?

Constitutional Provisions Involved

United States Constitution, Amendment IV, in relevant part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

Statement of the Case

Petitioner State of California seeks a writ of certiorari to have this Court review the decision of the California Supreme Court reversing the trial court's judgment of conviction. This case involves an issue of first impression as to the propriety of prearrest in-the-field transportation of suspects.

Respondent Mark Lee Harris was convicted in Los Angeles County Superior Court of burglary in the first degree, in violation of California Penal Code section 459. He was placed on probation for five years and was required to serve time in the Los Angeles County Jail as a condition thereof.

In a published opinion filed on December 22, 1974, the California Court of Appeal, Second Appellate District, Division Five, reversed the conviction based upon the Fourth Amendment on the ground that any prearrest transportation is invalid because it constitutes an arrest of the suspect and therefore cannot be carried out without probable cause. (Appendix B.) A petition for hearing in the California Supreme Court was filed by petitioner State of California and was granted on February 6, 1975. In a published opinion filed on October 7, 1975, the California Supreme Court reversed respondent's conviction in the trial court upon the ground that because of the transportation of the suspect, the continuation of the prearrest detention occurred in violation of the Fourth Amendment. (Appendix A.)

Statement of Facts[1]

Joseph Marx and his wife lived at 449 South McCadden Place in Los Angeles, a two-story residence. On November 4, 1972, at about 7 p.m., Mr. and Mrs. Marx left their residence. At this time all the doors were locked, including the front door which was double-locked; and the windows were bolted. [CT 6, 13.]

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[1]Since the issue raised in this petition involves rulings made by the trial court as a result of respondent's motion to suppress, only the facts brought out at the hearing pursuant to California Penal Code section 1538.5 will be set forth.

At about 10:15 p.m., Mr. and Mrs. Marx returned. They started for the front door in order to unlock it and go in. After they went about four paces from the front door, they heard a noise inside. Knowing that no one should be in their house, since they lived alone, they got back into their car and backed out of the driveway. [CT 6-7.]

Mr. Marx drove into his neighbor's driveway and then went there and rang the doorbell. His neighbor did not answer, and Mr. Marx returned to his car. While in the next driveway, Mr. Marx observed a car drive up in front of his house. The occupant of that car got out and wiped his front and back windows. Mr. Marx backed out his car, pulled up right in back of the other man's car and took down the license number. Mrs. Marx also put down the license number on a card twice. When Mr. Marx had taken down the license number, the other man "took off." [CT 7, 9.]

Mr. Marx then went to another neighbor's driveway. He found a little girl in that neighbor's house and had her call the police and tell them that there was a prowler in the Marxes' home. Mr. Marx then stood in front of his residence next to his car. [CT 7.]

Within 10 minutes the police arrived, and it was about 10:30 p.m. Then Mr. and Mrs. Marx gave the police a physical description of the person they had seen. This person was described as wearing dark trousers and a sweater. He also had a moustache. Mr. Marx guessed the man to be about 35 years old and to be Mexican. [CT 7, 11-12, 14.]

Robert Ryan and John Snee, police officers for the City of Los Angeles, assigned to Wilshire Patrol,

were partners on the evening of November 4, 1972. They received a radio call that "459" (burglary) suspects were at 449 South McCadden. They then responded by going to that location. [CT 15-16; RT 14.]

Upon arrival at that location, the two officers were met by an additional unit over which Officer Rada was in charge. He advised Officer Ryan that a suspect had been seen at the residence and a second suspect was possibly inside. The house was searched, but no suspect was found inside. [RT 15.]

Officer Rada informed Officer Ryan that he was advised by one of the victims that a suspect had been seen upon their arrival home. The suspect was described as a male Caucasian with dark hair, who had a moustache, was approximately 5 feet 8 inches tall, weighed approximately 150 pounds, and was wearing a light cardigan sweater and dark pants. Officer Rada also advised Officer Ryan that upon his arrival, he had heard dogs barking north of the location where the burglary had occurred and that he surmised that the dogs were barking at somewhat of a succession northbound, and that possibly the suspect was heading in that direction at the rear of the houses. [RT 15.]

Officers Ryan and Snee proceeded northbound to search. As they were leaving from 449 South McCadden, they received an arrest report over the radio. The suspect was described as a male Caucasian, approximately 5 feet 5 inches tall, with a slight build, and dark complected. It was also stated that the individual was wearing dark pants and a light sweater and had a moustache. [CT 17, 29; RT 16.]

The officers proceeded northbound on Highland and arrived at Third Street, which is one block west and

two blocks north of the McCadden residence. That area is solely a residential area, and the officers observed two male Caucasians, who were later identified as respondent and Paul Steinberg,[2] walking westbound on Third Street away from McCadden Place. [CT 18, 32, RT 17-18.]

Both men had moustaches, were 5 feet 7 inches to 5 feet 9 inches tall, and were of a light build. Respondent was wearing a gray cardigan sweater and dark clothing which was possibly the same clothing worn by the burglary suspect, according to the description of the burglary suspect given over the radio. After seeing these persons, Officer Snee made a left-hand turn at Third going westbound and pulled into the second driveway from Highland. The officers stopped respondent and Steinberg because respondent was close enough in height and weight to detain him. [CT 18-19; RT 17-18.]

The officers then conducted a field interview requesting identification and the whereabouts of the suspects that evening. Officer Snee spoke with Steinberg while Officer Ryan spoke with respondent. Officer Snee asked Steinberg his name, where he was going, and where he had been. Steinberg gave identification and said that he was in the area to get something to eat and also said that he had come into the area by a bus from Wilshire Boulevard.[3] Officer Snee noticed that Steinberg seemed quite nervous at that time, had slight perspiration over his forehead, and did not want to stand still. [CT 20-21; RT 19.]

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[2]Steinberg was originally named as a co-defendant with respondent; however, the magistrate at the preliminary hearing did not find sufficient cause to order Steinberg to stand trial.

[3]The statements of Steinberg were received for probable cause only. [CT 21.]

Officer Ryan asked respondent why he was in the neighborhood. Respondent said that he was there looking for a restaurant. Respondent also said that he had taken the bus to Highland and Wilshire Boulevard and that he had been walking from that location. Officer Ryan knew that at that location there was a Bob's Restaurant on Citrus and Wilshire Boulevard, approximately 300 feet west of the Highland intersection. [CT 19-20.]

Officer Ryan then interviewed Steinberg. Steinberg told Ryan that he and respondent were in the area looking for a young lady who lived on McCadden Place. Officer Snee was at this point talking to respondent and asked who respondent was, where he was going, and the name of the individual he was with. Respondent told Officer Snee who the other individual was.[4] [CT 21-22; RT 22.]

At this time respondent and Steinberg were put in custody, although not under arrest. The officers did so because of the suspicious circumstances. There was a restaurant at the location where respondent said he got off the bus, and Steinberg did not know the last name and address of a girl he said that he was looking for at 11 p.m. in a residential area. Both men also appeared to be scared. [CT 22; RT 22, 32.]

Officer Ryan knew that Officer Rada had said that the victims or one of them had seen one suspect. Therefore, the two detained suspects were brought back to the McCadden location for a possible identification. Even though they were not under arrest, the

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[4]Respondent's statement was received for probable cause only. [CT 21.]

suspects were handcuffed. This action was taken in accord with departmental policy that any felony suspect who enters a police car or any person who could possibly endanger the officer's safety is to be handcuffed when placed in the police vehicle. [RT 22-23, 37; CT 22, 34.]

Kent Setty, a sergeant assigned to Wilshire Division, Uniformed Patrol, p.m. shift, had occasion to respond to the "459" (burglary) call at 339 South McCadden as field supervisor on November 4, 1972. Upon his arrival, he observed officers deployed in the location, a single family residence, two-story, and mid-block on the west side of the street. He was informed by officers that the victims, residents of the house, believed that there had been an intruder-burglar inside the house. [RT 38-39.]

With other officers, Sergeant Setty made a room-to-room search of the residence. Although no one was inside, there was evidence of a burglary. Officers Rada and Dunn determined a point of entry which Sergeant Setty went to observe. At the rear of the house, which is on the west side, there was a service porch area with a high window. There was a teacart with an open window above it. There was also a footprint on the dust on the top shelf of the teacart. [RT 39-40.]

Sergeant Setty inspected that particular footprint. It was of a ripple-soled shoe, and he could see that there was wording in the print. By lying down on the teacart's lower shelf, looking up and inspecting

with an oblique light, Sergeant Setty could read the words "Neoprine" and "Oil Resistant" in the print on the glass. [RT 41.]

About five minutes later, Sergeant Setty became aware that Officers Ryan and Snee had some suspects in custody. Sergeant Setty, who was the immediate supervisor, went out to meet them. Officers Snee and Ryan told Sergeant Setty that they had observed the suspects in the area of Third and Highland and that they generally fit the description of the person seen as to clothing, hair, facial hair, height, and weight. They also told Sergeant Setty that both respondent and Steinberg had been breathing rapidly and that respondent's heart was beating rapidly. Sergeant Setty also observed that the two suspects were only being detained for investigation at the time. [RT 41, 44; CT 23.]

The suspects were asked to step out of the police vehicle. Sergeant Setty admonished both that they were in the custody of the police but that that did not mean they were guilty and that the officers wanted to exclude or include them as suspects. Sergeant Setty had respondent and Steinberg stand in similar light about 25 feet from Mr. and Mrs. Marx so that the Marxes could view them. However, neither Mr. nor Mrs. Marx could make a positive identification. [RT 41; CT 23, 33.]

Sergeant Setty then looked at both suspects' shoes as they stood on the ground. He noticed that respondent's shoe [People's Exh. 1; CT 25, 45] was a ripple-

soled shoe, which was at least similar in appearance to the one which had left its print in the dust. Sergeant Setty had the shoe taken off respondent and personally took the shoe to the teacart. He visually compared the shoe and the print at a close distance. He noted that the two looked similar. On the underside of respondent's shoe, Sergeant Setty observed that the word "Neoprine" was on the instep area and the words "Oil Resistant" were on the toe area. Sergeant Setty took the shoe back out. He advised the officers to take both respondent and Steinberg back to Wilshire detectives and indicated that the shoes were to be booked as evidence. Respondent and Steinberg were then placed under arrest. [RT 42; CT 24-25.]

Mr. and Mrs. Marx were allowed to go into their house. Apparently the burglar or burglars had had time to take only some change, and a folded $10 bill and $1 silver certificate that had been lying in a drawer. [CT 8, 27.]

Mr. Marx observed that the French doors in the den had had a flower pot thrown through two windows, one to open the lock and the other to pull the bolt. There was glass all over the floor. The back porch window had been jimmied open, and the serving table had been pushed up against it so that a person could climb in that window. This serving cart was iron, about 18 by 36 inches, with a glass top on it and wheels to roll it. It had been in the patio before Mr. and Mrs. Marx had left at 7 p.m., which is where it usually sat. Mr. Marx also observed the

footprints on the glass which were not there when the Marxes had left at approximately 7 p.m. [CT 9-10.]

At the police station, a booking search was made of respondent and Steinberg. From Steinberg's wallet a $10 bill was removed, and from respondent's wallet a $1 bill was removed. There was other currency in each of their wallets, but these bills were folded separately and were apart from the rest. The $1 bill was unusual because it was a silver certificate, and both bills were also of early printing. In addition, respondent and Steinberg had miscellaneous change. [CT 26-27.]

Richard Bingle, a criminolist employed by the City of Los Angeles for the Los Angeles Police Department and assigned as officer-in-charge of the comparative analysis unit, received the pair of shoes [People's Exh. 1] and the glass table top, on top of which were several imprints. Through the use of exemplars made from photographs [People's Exhs. 2A, 2B; CT 40, 45] and an overlay made from a film transparency [People's Exh. 2C; CT 41- 45], he formed the opinion that the imprint on the table was made by the tip of the right shoe [People's Exh. 1] that he had received. [CT 39-41.]

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

This Case Presents the Unresolved and Important Question of Whether There Are Circumstances Under Which a Police Officer May Transport a Suspect, Without Probable Cause to Arrest the Suspect, to the Scene of the Crime for Possible Identification as Part of a Valid Investigatory Detention Within the Fourth Amendment

The trial court in the instant case determined that the transportation of respondent back to the scene of the crime for possible eyewitness identification was a reasonable procedure and was part of a valid investigatory detention under the totality of the circumstances. [RT 54-55.] The California Court of Appeal, Second Appellate District, Division Five, reversed the trial court on the ground that there can never be a transportation of a prearrest suspect anywhere for any reason when the officers have less than probable cause to arrest. The sole basis for this decision was that court's interpretation of the Fourth Amendment. (Appendix B, pp. 18-19.)

The California Supreme Court, after vacating the Court of Appeal's decision, again reversed the conviction of respondent upon the ground that there was an improper transportation of a prearrest suspect. Again, the sole basis for this decision was a balancing of ". . . the individual's right of liberty and personal freedom, sanctified by the Fourth Amendment, on the one hand, and society's continuing needs to protect itself and its citizens from criminal marauders on the other." (Appendix A, p. 6)[5] Petitioner agrees that

[5]It should be noted that state constitutional provisions were not mentioned or referred to as a basis for the California Supreme Court's decision. Only the Fourth Amendment was utilized and interpreted. It should also be noted that in *People v. Norman*, 14 Cal. 3d 929, 940, 123 Cal. Rptr. 109, 117, 538 P. 2d 237, 245 (1975), in a concurring opinion, Justice Richardson stated that the reasonableness standard of Article I, section 13, of the California Constitution was the same as that in the Fourth Amendment and that decisions as to that standard by the United States Supreme Court should be followed. Justice Richardson authored the majority opinion in the instant case. No separate concurring opinions were filed.

this should be the proper test for measuring police conduct against the Fourth Amendment and that this Court has applied the test enumerated by the California Supreme Court in prearrest detentions. *United States v. Brignoni-Ponce*, ... U.S. ....., 95 S. Ct. 2574, 2578-79 (1975). Petitioner respectfully submits, however, that in light of the facts of the instant case, the decision of the California Supreme Court was erroneous in that rather than applying such a balancing test in order to determine if the transportation of respondent was reasonable in light of the circumstances of the instant case the California Supreme Court ruled that transportation of a prearrest suspect is generally invalid as an alternative action to police officers during a valid detention no matter what the surrounding circumstances might be.[6] This Court, therefore, should specify exactly what is permissible under the Fourth Amendment with regard to transportation of prearrest suspects as part of a valid investigatory detention.

This Court, although never squarely ruling upon the issue of the permissibility of the transportation

[6]The California Supreme Court did apparently indicate that in the case of an incapacitated or injured victim, such a prearrest transportation would be valid. However, petitioner submits that the Fourth Amendment does not so restrict police action to specific situations, but rather should allow prearrest transportation when the circumstances indicate that such action is reasonable. The reasonableness of such action, of course, could only be able to be determined upon a case-by-case basis.

of suspects being detained upon less than probable cause to arrest, has noted the importance of this issue. In *Davis v. Mississippi*, 394 U.S. 721 (1969), this Court referred to investigatory detentions with regard to fingerprinting and acknowledged that there might be permissible, narrowly circumscribed procedures for obtaining the fingerprints of a suspect during the course of an investigation even though there was no probable cause to arrest. *Id.* at 728. However, the Court specifically did not reach this issue because the defendant in that case had been invalidly detained when first confronted by the police. *Id.* at 726-27. *See also United States v. Dionisio*, 410 U.S. 1, 11 (1973). It should further be noted that the importance of the issue of investigatory techniques during detention, beyond the normal field interrogation, was pointed out in Justice Black's dissent in *Davis* when he stated, "I think it is high time this Court, in the interest of the administration of criminal justice, made a new appraisal of the language and history of the Fourth Amendment and cut it down to its intended size." *Davis v. Mississippi, supra* at 729-30.

In *Morales v. New York*, 396 U.S. 102 (1969), this Court again was unable to decide a similar issue—that of the transportation for custodial questioning of a suspect upon less than probable cause—because the record did not permit satisfactory evaluation of the facts surrounding the apprehension and detention of the defendant and therefore the case was remanded so that an evidentiary hearing could be held in order to establish such facts. *Id.* at 105-06. The importance of the prearrest transportation issue, however, was again noted by this Court when it stated that such an issue involved a ruling beyond those decisions made in *Terry*

v. Ohio, 392 U.S. 1 (1968), and *Sibron v. New York*, 392 U.S. 40 (1968). *Id.* at 104-05.

Petitioner asks this Court to grant certiorari in order to answer the question of whether it is reasonable, within the definition of the Fourth Amendment, to transport a suspect to the scene of the crime for possible eyewitness identification as part of a valid investigatory detention when certain specific articulable facts are known to the police officer. Petitioner submits that unlike the previously cited cases, the instant case's record properly presents this issue before this Court.

Petitioner further urges this Court to uphold the procedures utilized by the police in the instant case and to establish a holding allowing such prearrest transportations. The Constitution does not forbid all searches and seizures but only unreasonable searches and seizures, and the issue should be whether in light of all the circumstances of the police-suspect encounter, the suspect's right to personal security was violated by an unreasonable search and seizure. *Terry v. Ohio, supra*, 392 U.S. at 9. The exclusionary rule should not be invoked based solely upon whether legitimate police investigative techniques are similar to conduct which involves unwarranted intrusions upon constitutional protections, but rather the rule should be invoked only after a case-by-case examination since "street encounters between citizens and police officers are incredibly rich in diversity." *Terry v. Ohio, supra* at 13.

In the instant case the California Supreme Court acknowledged that the initial detention of respondent was valid and was the result of a reasonable investigative procedure. (Appendix A, p. 4.) In addi-

tion, the field interview was found to have yielded a "deepening" suspicion that respondent had been involved in the burglary due to implausible and contradictory explanations and an over-all nervous appearance. (Appendix A, p. 5-6.)

It was at this point that the officers transported respondent to the scene of the crime for possible eyewitness identification. Said transportation was based upon the specific articulable facts known to the officers that eyewitnesses were present at the crime scene, the scene was a short distance (3 blocks) away, and the crime had recently occurred (approximately 45 minutes earlier). The entire purpose of the transportation was to avoid prolonging the detention[7] by either releasing an innocent man or making an arrest based upon adequate cause.

Clearly, such a procedure was and is reasonable within the definition of that term for Fourth Amendment purposes. There was potential benefit to both respondent and the police in the form of determining whether the investigation of respondent was only a fruitless effort, causing a cloud of needless suspicion to remain over respondent, or whether in fact the police had had the good fortune to successfully terminate an investigation early.

The majority of the California Supreme Court apparently holds that since other alternatives existed besides transportation, that transportation of the suspects to the scene of the crime became unreasonable under

[7]Of course, as the California Supreme Court notes, there was reason for prolonging the detention since further circumstances, although not providing probable cause to arrest, had been developed to lead to a reasonable belief that respondent was involved in the burglary. (Appendix A, pp. 5-6.)

the Fourth Amendment. Petitioner respectfully disagrees and instead asserts that the reasoning of Justice Clark, writing for the dissent, should be applied.

> "It is doubtful whether defendant—reasonably suspected of committing a felony and of then lying to the police about his involvement—could reasonably have been expected to honor a mere promise to appear for a subsequent confrontation with his victims.
>
> "On the other hand, immediate confrontation at the crime scene had the following advantages: The victims' memories were fresh. The condition of initial observation could be reproduced. Defendant and his companion had not had time to intimidate their victims. Further, defendant had not had time to shave off his moustache or to change his light cardigan sweater and dark trousers or, more importantly, his distinctive ripple-soled shoes. Finally, had he been innocent, his innocence could have been established immediately.
>
> "The majority's other alternative—making the victims come to defendant—is unacceptable. The victim's rights should be valued at least as highly as a suspected felon's." (Appendix A, dissenting opinion, pp 11-12.) (Footnote omitted.)

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . ." *Adams v. Williams*, 407 U.S. 143, 145 (1972). The officers in the instant case did not "shrug their shoulders," but rather utilized the most reasonable and prudent means available under the cir-

cumstances in order to resolve their justifiable and increasing suspicions of respondent while also guaranteeing at the same time that respondent might be able to have the cloud of suspicion removed as to himself. *See Bates v. United States,* 405 F. 2d 1104, 1106 (D.C. Cir. 1968). An otherwise permissible detention should not be restricted to the precise point of accostation when such specific articulable facts are present as were known by the officers in the instant case. *People v. Courtney,* 11 Cal. App. 3d 1185, 1191, 90 Cal. Rptr. 370, 374 (1970).

Conclusion

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, In Bank.

The People, Plaintiff and Respondent, vs. Mark Lee Harris, Defendant and Appellant. Crim. 18430 (Super. Ct. No. A290594).

Filed: October 7, 1975.

Defendant was charged with burglary (Pen. Code, § 459). His motion to suppress evidence (Pen. Code, § 1538.5) was denied. After a jury trial, he was found guilty of first degree burglary and placed on probation. He appeals from the judgment of conviction, asserting that the motion to suppress should have been granted. We have concluded that the motion was improperly denied and that the judgment must be reversed.

The victims, Mr. and Mrs. Marx, were the sole occupants of a residence at 449 South McCadden Place, Los Angeles. They left their home one Saturday evening at 7 p.m. and returned about 10:15 p.m. Mr. Marx parked their car in the driveway and, as they approached the front door of the residence, they heard a noise which indicated to them that someone was inside. The Marxes returned to their car and drove to a neighbor's home to call the police. Finding no one at home, the Marxes then drove to another nearby residence and asked the occupant to summon the police. While there, they observed a car stop in front of their home. The driver stepped out of the vehicle and wiped its front and rear windows. Mr.

Marx, believing that such activity was unusual and that there might be a connection between the driver and the person suspected of being inside his home, backed his car out of the neighbor's driveway and drove up behind the unknown car. Mrs. Marx copied the license number of that car. The other driver then drove way.

The police arrived at the Marx Home at approximately 10:30 p.m. The Marxes gave the officers the license number of the car they had observed and the following description of the person they had seen in front of their home: male Caucasian, dark hair, moustache, about 5′8″ tall, about 150 pounds, wearing a light cardigan sweater and dark trousers.

Among the arriving police were Officers Ryan and Snee who were given by the officer in charge a description of the suspect who had been seen in front of the residence. They also were told of the possibility that a second suspect was inside the Marx residence. The officer in charge further informed Ryan and Snee that he had heard dogs barking in succession in a northerly direction suggesting the possibility that someone was headed on that course.

Officers Ryan and Snee proceeded north on Highland, a street which runs parallel to, and a block west of, McCadden, and continued north two blocks to the intersection of Highland and Third Street. The area was residential. Shortly thereafter, at approximately 11 p.m., they observed defendant and a male companion crossing Highland, westbound on Third Street, approximately three blocks from the Marx residence. The physical appearance of defendant and his clothing approximated the description furnished to the officers.

The suspects were stopped and interrogated separately. Defendant stated that he was looked for a girl named Donna who lived on McCadden Place. His companion said they had taken a bus to Highland and Wilshire—several blocks south of Third—and had been walking from the bus stop looking for a restaurant. Officer Ryan knew that there was a restaurant at Wilshire and Citrus, about 300 feet west of the bus stop. Both defendant and his companion appeared nervous.

The suspects were searched, handcuffed and placed in the back of the police car. Without asking the suspects' consent, Officers Ryan and Snee then drove the suspects back to the Marx residence for possible identification by the Marxes, who were unable, however, to identify either suspect as the man they had observed in front of their home that evening.

While Officers Ryan and Snee continued their interrogation of the suspects, other officers discovered that someone had apparently entered the house through the service porch window by climbing on top of a dusty teacart. A footprint of a ripple-soled shoe bearing the words "Neoprine" and "Oil Resistant," was observed in the dust. Immediately after the Marxes failed to identify either suspect as the man they had observed in front of their home, a police sergeant noticed that defendant's shoe was ripple-soled. An officer removed defendant's shoe, took it to the teacart, and visually matched it with the shoeprint in the dust. Defendant and his companion were then formally placed under arrest.

Further police investigation revealed that the burglar or burglars had removed some change from a "piggy" bank in the Marx residence, as well as a folded $10

bill and a $1 silver certificate, both of which had been deposited before the burglary in Mrs. Marx' jewelry box. An inventory search conducted incident to the suspects' booking subsequently disclosed a $1 silver certificate in defendant's wallet and a folded $10 bill in his companion's wallet.

Defendant, contending that his detention and subsequent conveyance to the Marx residence were unlawful, moved to suppress the currency together with evidence of the matching shoeprint. The motion was denied and the evidence (shoeprint and paper currency) introduced at trial formed the major basis for defendant's conviction.

1. *The detention.*

Although defendant contends otherwise, the officers had sufficient cause to detain defendant for initial questioning. It is well established that a temporary detention may be justified by circumstances falling short of probable cause to arrest a suspect. (People v. Mickelson (1963) 59 Cal.2d 448, 450.) In amplification of this principle we recently explained, "[a] police officer may stop and question persons on public streets, . . . when the circumstances indicate to a reasonable man in a like position that such a course of action is called for in the proper discharge of the officer's duties. [Citations.] The good faith suspicion which warrants an officer's detention of a person for investigative reasons is necessarily of a lesser standard than that required to effect an arrest. [Citation.] Where there is a rational belief of criminal activity with which the suspect is connected, a detention for reasonable investigative procedures infringes no constitutional restraint. [Citation.]" (People v. Flores (1974)

12 Cal.3d 85, 91; see People v. Gale (1973) 9 Cal.3d 788, 797-798; Irwin v. Superior Court (1969) 1 Cal.3d 423, 426-427.)

The foregoing standard for *detention* is of lesser degree than that applicable to an *arrest*. Cause for arrest exists when the facts known to the arresting officer "would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." (People v. Terry (1970) 2 Cal.3d 362, 393; People v. Ross (1967) 67 Cal.2d 64, 69-70; People v. Ingle (1960) 53 Cal.2d 407, 412.) The People concede that the circumstances were insufficient to furnish reasonable cause to *arrest* the suspects. However, in the instant case, the circumstances did disclose a reasonable possibility that defendant and his companion were involved in the burglary. These circumstances included their presence in a residential area at 11 p.m., and the general similarity between defendant's appearance and Marx' description of one of the suspects, thus meeting the requisite but lesser detention standards of "good faith suspicion," and "rational belief of criminal activity" expressed by us in *Flores*. The initial *detention* and questioning were entirely proper. (See People v. Watson (1970) 12 Cal.App.3d 130, 134-135.)

2. *The transportation.*

The principal difficulty in the matter before us arises from the police conduct following the detention when circumstances known to the police placed the case in that gray area in which the facts justify measures beyond detention but short of arrest. As we have noted, after questioning defendant and his companion the officers were presented with additional facts pointing

to the suspects' possible involvement in the burglary, namely, their somewhat contradictory explanations regarding their presence in the neighborhood, and their nervous appearance. At that time the investigation imperceptibly entered a new stage. Suspicion was deepening. The officers fairly entertained growing doubts as to the veracity of defendant and his companion. The People urge that, at this point, despite the continued lack of reasonable cause to arrest the suspects, the officers properly could transport them to the scene of the crime for possible identification by the Marxes.

The propriety of such an in-the-field transportation of suspects prior to arrest poses the principle issue in the case. Here lies the pressure point between the individual's right of liberty and personal freedom, sanctified by the Fourth Amendment, on the one hand, and society's continuing needs to protect itself and its citizens from criminal marauders on the other. Accommodation of both of these considerations requires, on occasion, a balancing in its most sensitive form.

A detention of an individual which is reasonable at its inception may exceed constitutional bounds when extended beyond what is reasonably necessary under the circumstances. (See Willett v. Superior Court (1969) 2 Cal.App.3d 555, 559; Pendergraft v. Superior Court (1971) 15 Cal.App.3d 237, 242; People v. Rosenfeld (1971) 16 Cal.App.3d 619, 622-623; cf. People v. Gale, *supra*, 9 Cal.3d 788, 798-799.) In *Pendergraft*, a case involving an unduly prolonged detention, the court properly observed that "[n]o hard and fast rule can be formulated for determining the reasonableness of the period of time elapsing during a detention. The dynamics of the detention-for-questioning situation may justify further detention, further

investigation, search, or arrest. The significance of the events, discoveries, and perceptions that follow an officer's first sighting of a candidate for detention will vary from case to case." (Fns. omitted; 15 Cal.App.3d at p. 242.)

As a general proposition, despite defendant's urging, we are disinclined to hold that under no circumstances short of probable cause to arrest may an officer transport a suspect to another location for further interrogation or possible identification. Although one court has suggested that such a procedure is unreasonable and amounts to an arrest without probable cause (People v. Gonsoulin (1971) 19 Cal.App.3d 270, 275), other courts recognize that certain circumstances may justify a "transport" detention somewhat similar to that involved herein (People v. Courtney (1970) 11 Cal.App.3d 1185, 1191-1192). For example, in *Courtney*, the investigating officer adjourned his interrogation of the suspect when a crowd of potentially hostile students gathered at the detention scene. He transported the suspect to a campus police department and resumed the interrogation there. The court held that "there was no Fourth Amendment compulsion on the police to choose between an on-the-spot continuation of their investigation at the probable cost of their own safety, *or* abandoning the investigation, . . . We recognize that it is only in a rare case where, absent probable cause for arrest, the removal of a suspect to a police station for further investigation is constitutionally permissible." (11 Cal.App.3d at p. 1192.)

We can conceive of factual situations in which it might be quite reasonable to transport a suspect to the crime scene for possible identification. If, for example, the victim of an assault or other serious offense

was injured or otherwise physically unable to be taken promptly to view the suspect, or a witness was similarly incapacitated, and the circumstances warranted a reasonable suspicion that the suspect was indeed the offender, a "transport" detention might well be upheld. Similarly, the surrounding circumstances may reasonably indicate that it would be less of an intrusion upon the suspect's rights to convey him speedily a few blocks to the crime scene, permitting the suspect's early release rather than prolonging unduly the field detention.

Ordinarily there exist less intrusive and more reasonable alternatives to pre-arrest transportation. The officers may call or escort the witness to the detention scene for an immediate viewing of the suspect, or if they are able to procure satisfactory identification from the suspect, arrangements may be made for a subsequent confrontation with the witness. In addition, the consent of the suspect may be sought. As we suggested in People v. Mickelson, *supra,* 59 Cal.2d 448, 454, rather than conduct an illegal car search the officers could have requested defendant "to accompany the officers the few blocks to the [crime scene] . . . for possible identification . . . ." (See also People v. Hanamoto (1965) 234 Cal.App.2d 6, 13-15; People v. Gibson (1963) 220 Cal.App.2d 15, 24.)

In the instant case, the officers pursued none of these alternative procedures. Instead, they handcuffed the suspects and conveyed them to the Marx home. Without arrest and in the absence of any exigency, the initial detention was continued by means of transportation followed by further interrogation. Under the facts of this case the officers' procedures violated defendant's constitutional rights. The applicable principles have been well expressed in a recent text on the subject of arrests: "Decisions made at different stages in the criminal justice process vary in their effect upon the person being dealt with. Generally, it can be said that decisions carrying more serious consequences for the individual require a greater degree of certainty that he is in fact guilty. This suggests that the propriety of field interrogation where there are insufficient grounds for arrest may depend upon whether the harmful effects are substantially less than those which result from a formal arrest." (Fn. omitted; LaFave, Arrest, The Decision to Take a Suspect into Custody (1965) ch. 16 at p. 346; see also pp. 347-349.) While in the instant case the detention procedure employed by the officers was not necessarily "harmful" to defendant in any permanent sense, the restraint upon his personal freedom was measurably greater than mere stationary field interrogation. We hold that it was impermissibly so.

The police activity in the record reveals proper initial detention, improper transportation, further interrogation and inspection of defendant's apparel. The sequence was unfortunate because the continued police investigation revealed circumstances that seemingly point unerringly to defendant's complicity in the burglary. Nonetheless, the identification of shoes and currency, so incriminating to defendant, followed the transportation

detention. It is a fundamental principle in our jurisprudence that an illegal police procedure cannot be justified by its fruits. (See People v. Fein (1971) 4 Cal.3d 747, 756 [illegal arrest]; Tompkins v. Superior Court (1963) 59 Cal.2d 65, 68 [illegal search].)

Defendant's motion to suppress evidence should have been granted, for that evidence was the result of an unlawful detention. (See Davis v. Mississippi (1969) 394 U.S. 721; People v. Moore (1968) 69 Cal.2d 674, 680; Pendergraft v. Superior Court, *supra,* 15 Cal.App.3d 237, 242-243; People v. Lingo (1970) 3 Cal.App.3d 661, 664-665.) Since the challenged evidence formed the basis for defendant's conviction, the introduction of that evidence constituted reversible error.

The judgment is reversed.

Richardson, *J.*

We concur:

Tobriner, *J.*
Mosk, *J.*
Sullivan, *J.*

DISSENTING OPINION BY CLARK, J.

I dissent.

Assuming arguendo that defendant would not have consented to returning three blocks to the crime scene, what alternatives do the majority offer? "The officers may call or escort the witness to the detention scene for an immediate viewing of the suspect, or if they are able to procure satisfactory identification from the suspect, arrangements may be made for a subsequent confrontation with the witness." (*Ante,* p. .....*)

It is doubtful whether defendant—reasonably suspected of committing a felony and of then lying to the police about his involvement—could reasonably have been expected to honor a mere promise to appear for a subsequent confrontation with his victims.

On the other hand, immediate confrontation at the crime scene had the following advantages: The victims' memories were fresh. The conditions of initial observation could be reproduced. Defendant and his companion had not had time to intimidate their victims. Further, defendant had not had time to shave off his moustache or to change his light cardigan sweater and dark trousers or, more importantly, his distinctive ripple-soled shoes. Finally, had he been innocent, his innocence could have been established immediately.

The majority's other alternative—making the victims come to defendant—is unacceptable. The victim's rights

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*Majority opinion, page 8.

should be valued at least as highly as a suspected felon's.[1]

I would affirm the judgment.

Clark, *J.*

I concur:

McComb, *J.*

[1]In addition it must be asked whether those infringements upon the suspect's freedom which the majority proposes to avoid will only be increased by such procedure. While victims are being transported, considerations of convenience and safety for the detaining officers will reasonably require the suspect be placed in physical custody, either handcuffed in the back of a police unit or held at the nearest police station. A second available police unit must be located and dispatched to the victim's residence, then returned to the suspect's place of detention. Thus, in terms of both manner and length of detention, the degree to which the freedom of a suspect is infringed will equal, if not exceed, that resulting from transporting the suspect to the victim.

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

The People of the State of California, Plaintiff and Respondent, vs. Mark Lee Harris, Defendant and Appellant. 2d Crim. No. 24550, (Sup. Crt. No. A-290594).

Filed: Dec. 12, 1974.

Defendant Mark Lee Harris was charged with burglary. His motion to suppress evidence (Pen. Code, § 1538.5) was denied. After a jury trial, he was found guilty of first-degree burglary, and placed on probation. On this appeal the only issue is whether a motion to suppress should have been granted.[1]

FACTS

The victims, Mr. and Mrs. Marx, lived at 449 South McCadden Place, Los Angeles. They left their house one Saturday evening at 7 p.m. and returned at about 10:15 p.m. Marx parked their car in the driveway. As they approached the front door they heard a noise inside the house. Since the Marxes lived alone, they got back in their car, backed out of the driveway, and drove into a neighbor's house. While their car was in the driveway, they saw a car drive up in front of their house. The driver got out and wiped his front and rear windows. Mr. Marx backed out of the neighbor's driveway, pulled in behind the unknown car, and wrote down the license plate number.

[1]By stipulation the motion was based on the transcript of the preliminary hearing and additional testimony presented at the hearing held pursuant to Penal Code section 1538.5.

At this point, the other driver "took off." The police arrived at about 10:30 p.m. The Marxes gave the police a description of the person they had seen as well as the license plate number of his car.

Among the officers to arrive were Ryan and Snee. The officer in charge told them that a suspect had been seen at the residence, and that a second suspect was possibly inside the house; but when it was searched no suspect was found inside. The officer in charge told Ryan and Snee that the victims had observed a suspect, described as a male Caucasian, dark hair, moustache, about 5′8″ tall, about 150 pounds and wearing a light cardigan sweater and dark pants.[2] The officer in charge also told Ryan and Snee that he had heard dogs barking north of the burglarized house, and they were barking at somewhat of a succession northbound, as if the suspect were headed in that direction.

Officers Ryan and Snee headed northbound on Highland, a street that runs parallel to and a block west of McCadden. They drove two blocks north to Third Street. The area is solely residential. It was about 11 p.m. They observed defendant and one Paul Steinberg[3] crossing Highland, westbound on Third Street, away from McCadden Place.

The physical description of defendant approximated that furnished the officers. Defendant was wearing a light cardigan sweater and dark clothing, possibly the same clothing as the burglary suspect.

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[2]Mr. Marx testified that the man he saw was wearing a dark sweater and that he so described him to the police. How it became a light cardigan is obscure.

[3]The case against Steinberg was dismissed at the preliminary hearing.

Each suspect was interviewed separately. Defendant said he was looking for a girl named Donna who lived on McCadden place. Steinberg said they had taken a bus to Highland and Wilshire—several blocks south of Third—and had been walking from that location, looking for a restaurant. Officer Ryan knew there was a restaurant at Wilshire and Citrus, about 300 feet west of Highland. The suspects appeared nervous. The officers were suspicious because of the conflicting statements, the restaurant story, and the suspects' nervousness.

Defendant and Steinberg were searched, handcuffed and placed in the back of the police car.[4] They were taken back to the Marx residence, for possible identification by the Marxes.

Neither Mr. nor Mrs. Marx could identify either suspect. In fact, at the preliminary hearing Mr. Marx positively testified that the man he had seen outside his home was not in the courtroom.

Meantime, other officers investigating at the scene had determined that someone had entered the house through the service porch window by climbing on top of a dusty teacart. A footprint of a ripple-soled shoe was observed in the dust. The words "Neoprine" and "Oil Resistant" were visible. A police sergeant looked at Harris' shoes and saw that they were ripple-soled, similar in appearance to the shoe which had left its print in the dust. A police officer removed defendant's shoe, took it to the teacart and visually matched it up with the shoeprint in the dust.

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[4]Specifically, Harris' shoes were removed by an officer at Third and Highland to determine whether there was money inside them. Officer Snee was unable to recall whether Harris was permitted to put them back on before the group's arrival at the Marx residence.

Defendant and his companion were then formally placed under arrest.

The burglar or burglars had had time to take only some change and a folded $10 bill and $1 silver certificate that had been lying in a drawer.

The evidence at the trial on which defendant was convicted was, first, testimony about the suspect's and defendant's descriptions; second, that when arrested a $10 bill was removed from Steinberg's wallet and a $1 silver certificate from defendant's wallet; and, third, that defendant's shoeprint matched the shoeprint found on the teacart.

DISCUSSION

We need not spend much time on defendant's contention that the initial detention was illegal. The case he cites, *People v. Mickelson*, 59 Cal.2d 448, 450-451, and several hundred following, make clear that the initial detention was reasonable. The problem is what followed. It will be recalled that in *Mickelson* the police had a report of a 2 a.m. market robbery. The robber was identified as a fairly tall white man of large build, with dark hair, wearing a red sweater and armed with a .45 automatic. Shortly after starting the search for the suspect, an officer saw a station wagon which defendant's companion, one Zauzig, was driving and in which defendant was a passenger. Zauzig appeared to be a large white man with dark hair, wearing a red sweater or jacket. The station wagon made several suspicious changes of direction and was eventually stopped. It was then searched and the fruits of the robbery were discovered. The occupants were arrested. In suppressing the fruits of the search, the

court held that it was entirely reasonable to stop the station wagon for investigation and to take reasonable precautions for the officer's safety. He did not, however, have probable cause to arrest Zauzig. "Instead of interrogating Zauzig and defendant with respect to the robbery or *requesting* them to accompany the officers the few blocks to the market for possible identification, the officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that might connect Zauzig with the robbery." (*Id.* p. 454. Italics added.)

In *Mickelson* the Supreme Court did not say what, if anything, the police could have done had Zauzig and his companion declined the request to accompany the officers back to the market for identification. In this case the People want us to hold, in effect, that such a request would have been nothing but an unnecessary public relations gesture: for if anything is clear from the record before us, it is that defendant was compelled to accompany the officers back to the Marx residence, after his person had been searched with some thoroughness at the scene of his initial confrontation with the police. During the trip back, he was in handcuffs. Although the People have never claimed that the officers had a right to arrest defendant, that is precisely what they did.[5]

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[5]In fact, in the trial court the People went out of their way to prove that no arrest was made until defendant's shoes were compared with the imprint left by the burglar. When one of the officers was asked whether defendant and his companion were arrested at Third and Highland, he answered: "We brought the individuals back to the location." The other officer, when asked: "Were they under arrest at that time?" answered, "No. They were being detained." He would not even admit that the suspects were "in custody."

(This footnote is continued on next page)

The legal premise on which the People urge affirmance is that a suspect, purportedly not under arrest but detained only for investigation, may be forcibly transported from the location where the investigatory detention took place and brought, handcuffed, to the scene for whatever aid his person and belongings may be in the investigation of a crime. *People v. Gonsoulin,* 19 Cal.App.3d 270 is to the contrary. It simply and correctly characterizes a similar transportation—though purportedly consented to—as an arrest. As noted, however, in this case the prosecution went to some pains not to claim that an arrest was justified or took place.

The constitutional basis for an enforced detention, short of an arrest, was explained in *Terry v. Ohio,* 392 U.S. 1. It will be recalled that there the Supreme Court "emphatically" rejected the notion that Fourth Amendment considerations are irrelevant to investigatory detentions. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

It is elementary that we may not support the trial court's refusal to suppress "on theories . . . invented for the consumption of reviewing courts." (*People v. Superior Court (Simon),* 7 Cal.3d 186, 198; cf. *People v. Miller,* 7 Cal.3d 219, 226; *Agar v. Superior Court,* 21 Cal.App.3d 24, 28-29.)

The People's reluctance to urge that an arrest at Third and Highland would have been justified is understandable. From the very beginning of the investigation it was questionable whether the person whom Mr. Marx observed had had anything to do with the burglary. As it turned out, he had not. Some explanation of the change of description from a dark sweater to a light cardigan would have been in order. There is the problem that defendant was on foot, not in the car Marx had observed. The officers' impression that the suspects appeared nervous, means practically nothing. (*People v. Moore,* 69 Cal.2d 674, 683.) Their stories were not really conflicting and the mere fact that there was a restaurant about 300 feet west from where the suspects said they had gotten off the bus does not mean that they knew of its existence.

(*Id.* p. 16.) The court then, after carefully analyzing the facts of the case before it, decided that the police were entitled to restrict the petitioner's freedom to go wherever he pleased and to force a temporary confrontation for the purpose of investigating the suspicious situation which they had observed. It then further decided that the officers had the right to take certain limited steps for their own protection during that confrontation. This subsidiary problem—the frisk—is not what concerns us here. What we are dealing with is, rather, the People's assertion that when the on-the-spot investigation proves fruitless, the police, though lacking a right to make an arrest, may nevertheless change the venue of the confrontation to a point several blocks away.[6]

To justify what took place the People rely on *People v. Watson,* 12 Cal.App.3d 130. *Watson* is not in point. It is a routine case involving a justifiable detention, followed by a permissible on-the-scene frisk which led to the discovery of contraband.

The People also cite *People v. Shoemaker, supra,* 16 Cal.App.3d 316, where the police were held to have reasonably detained the defendant in front of a bar where he was sitting on the curb. At the request of the police, the defendant then voluntarily led them to an automobile in which, according to defendant's

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[6]With respect to the fact that the defendant was handcuffed during the trip back to the Marx home, the People point to evidence that handcuffing is a standard procedure for felony suspects who enter a police vehicle and that it is done for the purpose of the officer's safety. We certainly have no quarrel with a reasonable police procedure designed to protect the safety and lives of officers while transporting a suspect or prisoner. The argument, however, misses the point which is whether or not the officers had the right to transport defendant in the first place.

story, he had arrived at the bar. When the party arrived at the car, which was about 75 feet from the initial point of confrontation, defendant started to shed marijuana. The court held that this voluntary act was not a response to improper police conduct.

Shoemaker is obviously not in point. There is a world of difference between a suspect voluntarily leading officers to an automobile 75 feet away and his being transported involuntarily, in handcuffs, for several blocks.

Finally, the People refer us to such cases as *People v. Rodriguez*, 10 Cal.App.3d 18, which, in spite of the so-called "Wade-Gilbert rule and *People v. Fowler*, 1 Cal.3d 335, 344, find no constitutional violation in an on-the-spot identification of the suspect by the victim, after the suspect has been arrested some distance from the scene of the crime. (See also, *People v. Williams*, 6 Cal.App.3d 274, 278; *People v. Burns*, 270 Cal.App.2d 238, 246.) This argument, too, misses the point. In the cases relied on by the People, the defendant was legally arrested. The question discussed was the legality of the confrontation with the victim at the scene of the crime, during which the arrestee was not represented by counsel and had not waived his right to such representation. Obviously, that is not the problem here where the attempted identification of defendant by Marx was negative.

Thus, there simply was no legal justification for the police to have defendant in their custody at the time when it became apparent that the physical characteristics of the shoes he wore became highly relevant to the investigation of the burglary. The case is thus on all fours with *Davis v. Mississippi*, 394 U.S. 721,

where the United States Supreme Court suppressed evidence of fingerprints obtained from the suspect during an illegal custody. Defendant's formal arrest based on the comparison between the shoe print left on the premises and the shoes he was wearing was therefore illegal, as was all other physical evidence—such as the money in his possession—that was obtained as a result of the arrest. (See also, *People v. Moore*, 69 Cal.2d 674, 683; *People v. Sesslin*, 68 Cal.2d 418, 426; *People v. Gardner*, 266 Cal.App.2d 19, 22; *People v. Gibson*, 220 Cal.App.2d 15, 26.)

The judgment is reversed.

CERTIFIED FOR PUBLICATION

Kaus, *P. J.*

We concur:

Stephens, *J.*

Hastings, *J.*

Superior Court No. A-290594 (Los Angeles County). Elias Powell, Judge.

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